In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 308

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 315

THOMAS PLUMERI AND FIRST NATIONAL KOSHER PROVISIONS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. A to both petitions) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970. The petition for a writ of certiorari in No. 308 was filed on June 22, 1970, and the petition

in No. 315 was filed on June 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in not turning over to the defense the program of instructions given to a computer to tabulate inventory.

2. Whether the details of a conversation between the prosecution and a witness during a recess in the trial were properly disclosed to the jury.

3. Whether the trial court disparaged the testimony of petitioner Plumeri.

4. Whether the references to petitioner Dioguardi under the abbreviated name of Dio deprived petitioners of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of fraudulently concealing the property of a bankrupt in contemplation of bankruptcy, of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy, both in violation of 18 U.S.C. 152, and of conspiring to commit the substantive offenses in violation of 18 U.S.C. 371. On December 11, 1967, petitioner Dioguardi was sentenced to imprisonment for five years and fined $10,000; petitioner Plumeri was sentenced to imprisonment for three years; and petitioner First National Kosher Provisions, Inc. was fined $10,000. The court of appeals affirmed.

The evidence is set forth in the opinion below (*Dioguardi* Pet. App. A). Briefly, it showed that petitioners Dioguardi and Plumeri had important roles in the operation of Consumers Kosher Provisions, Inc., a company in serious financial difficulties. In August 1964, American Kosher Provisions, Inc., a competitor, agreed to purchase all of Consumers' stock and assume all of its obligations. It also agreed to take over its operations pending the closing date of the sale (Gov't. Ex. 1). Upon the basis of this agreement, the creditors of Consumers withheld the invocation of various creditors' remedies (Tr. 445). On the closing date, October 27, all of Consumers' stock was not produced and American refused to consummate the purchase (Tr. 447–449). On October 29, 1964, an inventory of Consumers' property was made and property valued at approximately $32,000 was returned to Consumers (Tr. 613–617). On the same date, Dioguardi and Plumeri went into business as First National Kosher Provisions, Inc., utilizing Consumers' inventory, its plant and its leased trucks. The financial statements of First National never indicated that it had utilized a portion of Consumers' inventory or that it owed and money to Consumers or its creditors and First National never paid Consumers for the use of its property. When an accountant employed by First National noted that its profits were much too high, Dioguardi and Plumeri advised him that $5,523 of Consumers' inventory had been utilized by the company (Tr. 1017–1030, 1040–1045; Gov't. Ex. 29).

On January 25, 1965, three creditors filed a petition in bankruptcy against Consumers and eight days later it was adjudicated a bankrupt (Gov't. Exs. 22, 37). In March 1965, a trustee in bankruptcy was appointed (Tr. 1179–1180). At no time was this trustee informed that the inventory of Consumers had been transferred to First National and had been utilized by it (Tr. 1183, 1190).[1]

ARGUMENT:

1. A government witness calculated First National's purchases, sales and inventory from the date it commenced business (October 29, 1964) through the first month of its operations (Tr. 1304–1325). A second government witness who had supervised a computer tabulation then testified that, according to the tabulation, November 5 was the date when First National would have exhausted Consumers' inventory (Tr. 1437, 1438). Thereafter, the district court denied a defense request to require the government to produce the computer program, the electronic instructions given the computer to prepare the tabulations. The court of appeals pointed out (Dioguardi Pet. A12–13):

> The instruction here given the computer must have been one of utmost simplicity, as defense counsel must have realized—to start with the opening inventory, sum up the purchases and

[1] In the interval between the adjudication in bankruptcy and the appointment of the trustee, the petitioners moved First National from the old Consumers plant to another location and took some of Consumers' fixtures and equipment with them (Tr. 1173–1176).

> sales for each day, subtract the latter from the opening inventory, and repeat the process until the opening inventory was exhausted—in this case six times. Moreover, and more important, the data were so limited that defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance * * *. Even now, two and a half years after the trial, we are pointed to no error in the computer's calculations. * * *

In these circumstances, as the court below concluded, there was no prejudicial error in failing to turn over the computer program to the defense. Nor is there any broad issue raised as to the circumstances under which a computer may be used as part of the process to determine guilt in a criminal case.

2. On recross-examination, government witness Sol Alpert falsely denied that he had spoken to the prosecution about the case during the luncheon recess (Tr. 559–560). Following a short redirect examination (Tr. 570–576), the prosecutors disclosed their conversation with the witness to the court and defense counsel (Tr. 577–578). As the court below points out in detail (*Dioguardi* Pet. App. A6–A8), when the defense refused to take a position about how the trial judge should advise the jury about the false denial, the trial court properly permitted the prosecution to reveal the details of the conversations (Tr. 577–586).

3. Petitioner Plumeri testified extensively on direct examination (Tr. 2197–2375, 2507–2642). Near the end of his direct examination, his counsel formulated a lengthy statement based on the language in the conspiracy count and asked, "Did you do that?" (Tr. 2638–2640). The court concluded that such a question was unnecessary since Plumeri had pleaded not guilty. It refused to permit an answer to that question. The claim that this ruling in some manner disparaged the extensive testimony of Plumeri lacks merit. The trial judge permitted Plumeri to answer a series of six shorter questions based on the language of the indictment (Tr. 2640–2642).

The court did not err in instructing the jury to consider Plumeri's testimony in light of his interest in the outcome of the case. Such instructions have been repeatedly upheld. See, *e.g.*, *Taylor* v. *United States*, 390 F. 2d 278, 284–285 (C.A. 8).

4. The indictment identified petitioner Dioguardi as "John Dioguardi, a/k/a Johnny Dio." The claim that the trial judge erred in not striking the name "Johnny Dio" from the indictment is fully answered by the opinion below. As there noted, the defense itself caused the Dio name to be brought before the jurors. There is no substance to the contention that petitioners were denied a fair trial by the references to this name during the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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